Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO B–02–526 OF 2000
GOPAL SRI RAM, SITI NORMA YAAKOB AND ABDUL KADIR SULAIMAN JJCA
19 JANUARY 2001

Contract *— Turnkey contract — Breach of — Failure to carry out infrastructure works, whether fundamental breach — Whether contract a sham — Whether s 92 of Evidence Act 1950 applicable to decide real transaction behind the contract — Acquiescence, whether proved — Failure to pay fractional balance under contract, whether rescission justified*

The first appellant was the owner of a piece of land which was sub-divided into bungalow lots. The first appellant sold 372 lots to the respondents. The transaction between the appellants and the respondents was carried into effect through the mechanics of a number of written agreements, inter alia, the sale and purchase agreement and the Turnkey contract. The appellants contended that looking at the agreements as a whole and the correspondence exchanged between the parties, the Turnkey contract was a mere facade and that the real commercial bargain between the parties was a contract for the sale and purchase of the subject property. The trial judge found that the Turnkey contract was not a sham and held that the appellants were in breach of their obligations under the Turnkey contract. The appellants appealed.

Held:

(1) The agreements in this case must be read together and a breach of any of the terms of one of the agreements triggered a breach of all the agreements. Taken into consideration the later letters and the final agreements, the court found that the Turnkey contract did in truth and in fact create mutually enforceable legal obligations by which the parties considered themselves to be bound. Looking at the evidence in its totality, the question as to whether the Turnkey contract was a sham should be answered in the negative (see pp 330H, 337C, 339B).

(2) Section 92 of the Evidence Act 1950 had nothing whatever to do with this case. The judge was in error when he thought that it did. The appellants were not seeking to admit evidence to contradict the terms of the agreements that had been entered into. They wanted the court to see the real transaction behind the facade of the agreement (see p 333A).

(3) The finding by the judge that the appellants had persistently neglected to carry out the infrastructure works in accordance with the plans originally shown to the first respondent under the Turnkey contract was consistent with and was amply supported by the evidence on record. From the totality of the evidence, the

court was satisfied that the judge's finding that it was the appellants who were in breach of contract was free from any appealable error. Further, the breach by the appellants was of a fundamental obligation and went to the very root of the bargain between the parties. The first respondent was accordingly justified in putting an end to the contract between the parties (see pp 343A–B, D–E, 353F).

(4) The appellants should not succeed in their plea of acquiescence in the light of the finding that it was them who were in breach of their obligation and taking into account their conduct in failing to obtain the first respondent's consent to the amendments to the relevant plan. On the facts, the justice of the case favours the respondents rather than the appellants (see p 346D–E).

(5) The nature of the alleged breach by the respondents, if unjustified, did not entitled the appellants to terminate the entire bargain thay had with respondents. The agreements when read as a whole support the conclusion that the respondents' failure to pay the remaining fractional balance entitled the appellants to sue and recover the unpaid sum. It did not entitle them to treat the contractual arrangement with the respondents as being at an end (see pp 346I, 350B).

[**Bahasa Malaysia summary**

Perayu pertama merupakan tuanpunya sebidang tanah yang dibahagikan kepada lot-lot rumah banglo. Perayu pertama telah menjual 372 lot kepada penentang-penentang. Transaksi di antara perayu-perayu dan penentang-penentang telah dilaksanakan menerusi mekanisma sebilangan perjanjian bertulis, antara lain, perjanjian jual beli dan kontrak Turnkey. Perayu-perayu berhujah bahawa dengan meneliti perjanjian secara keseluruhan dan surat-menyurat di antara pihak-pihak tersebut, kontrak Turnkey cumalah satu dalih dan bahawa persetujuan komersil sebenar di antara pihak-pihak adalah suatu kontrak untuk jual beli hartanah yang berkenaan. Hakim perbicaraan mendapati bahawa kontrak Turnkey bukanlah satu muslihat dan memutuskan bahawa perayu-perayu telah melanggar obligasi mereka di bawah kontrak Turnkey. Perayu-perayu membuat rayuan.

Diputuskan:

(1) Perjanjian-perjanjian dalam kes ini mestilah dibaca bersama dan sebarang pelanggaran mana-mana syarat salah satu perjanjian akan mencetuskan kemungkiran semua perjanjian. Dengan mengambil kira surat-surat yang kemudiannya dan perjanjian-perjanjian muktamad, mahkamah mendapati bahawa kontrak Turnkey memang dan pada hakikatnya mewujudkan obligasi di sisi undang-undang yang saling boleh dikuatkuasakan yang mana

pihak-pihak menganggap mereka diikat. Dengan melihat keterangan secara menyeluruh, soalan mengenai sama ada kontrak Turnkey adalah satu muslihat haruslah dijawab dalam negatif (lihat ms 330H, 337C, 339B).

(2) Seksyen 92 Akta Keterangan 1950 tidak kena-mengena dengan kes ini. Hakim terkhilaf apabila beliau menyangka ia ada kaitan. Perayu-perayu bukannya memohon agar keterangan untuk menyangkal syarat-syarat perjanjian yang telah diikat dimasukkan. Mereka cuma ingin mahkamah mengambil perhatian terhadap transaksi sebenar di sebalik perjanjian (lihat ms 333A).

(3) Keputusan hakim bahawa perayu-perayu telah berulang kali gagal melaksanakan kerja infrastruktur menurut pelan-pelan yang telah ditunjukkan kepada penentang pertama pada mulanya di bawah kontrak Turnkey adalah selaras dengan dan disokong sepenuhnya oleh keterangan atas rekod. Daripada keseluruhan keterangan, mahkamah puas hati bahawa keputusan hakim bahawa perayu-perayulah yang telah memungkir kontrak tersebut adalah bebas daripada sebarang kesilapan yang boleh dirayu. Tambahan pula, kemungkiran perayu-perayu adalah bersifat obligasi asas dan membabitkan dasar persetujuan di antara pihak-pihak. Lantaran itu, penentang pertama berjustifikasi dalam menamatkan kontrak tersebut di antara pihak-pihak (lihat ms 343A–B, D–E, 353F).

(4) Perayu-perayu tidak harus berjaya dalam rayuan persetujuan tanpa bantahan (acquiescence) memandangkan keputusan bahawa mereka sendiri adalah pihak yang telah memungkir obligasi mereka dan dengan mengambil kira kegagalan mereka untuk memperolehi persetujuan penentang pertama terhadap pindaan kepada pelan yang relevan. Atas fakta-fakta, keadilan kes memihak kepada penentang-penentang dan bukan perayu-perayu (lihat ms 346D–E).

(5) Jenis kemungkiran olah penentang-penentang yang dikatakan, sekiranya tanpa justifikasi, tidak memberi hak kepada perayu-perayu untuk menamatkan keseluruhan persetujuan dengan penentang-penentang. Perjanjian-perjanjian tersebut apabila dibaca secara keseluruhan menyokong kesimpulan bahawa kegagalan penentang-penentang untuk membayar baki jumlah pecahan memberi hak kepada perayu-perayu untuk mendakwa dan mendapat kembali jumlah belum dibayar. Ia tidak memberi hak kepada mereka untuk menganggap persiapan kontraktual dengan penentang-penentang telah ditamatkan (lihat ms 346I, 350B).]

Notes

For cases on breach of contract generally, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 1946–2088.

Cases referred to

Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd [1999] 2 MLJ 500 (refd)
Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331 (refd)
Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282 (refd)
Cory v Gertcken (1816) 56 ER 250 (refd)
Gangabai v Chhabubai AIR 1982 SC 20 (refd)
Harrigan v Brown [1967] 1 NSWR 342 (refd)
James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd [1970] 1 All ER 796 (refd)
Kettles & Gas Appliances Ltd v Anthony Hordern & Sons Ltd (1934) 35 SR (NSW) 108 (refd)
Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd [1984] 1 MLJ 243 (refd)
Kuppusamy v Anggamah & Anor [1992] 1 MLJ 602 (refd)
L Schuler AG v Wickman Machine Tool Sales Ltd [1973] 2 All ER 39 (refd)
Manks v Whiteley [1912] 1 Ch 735 (refd)
Michael v Soon Teck Finance Co & Anor [1962] MLJ 53 (refd)
Mohamed Isa & Ors v Abdul Karim & Ors [1970] 2 MLJ 165 (refd)
Overton v Banister (1844) 67 ER 479 (refd)
Polsky v S and A Services [1951] 1 All ER 185 (refd)
Prenn v Simmonds [1971] 3 All ER 237 (refd)
Willmott v Barber (1880) 15 Ch D 96 (refd)
Habib Bank Ltd v Habib Bank AG Zurich [1981] 2 All ER 650 (refd)

Legislation referred to

Evidence Act 1950 s 92
Evidence Act 1950 s 92 [India]

KS Narayanan (*L Sabapathy*, *Rohan Sankey*, *Tharminder Singh* and *Saranjit Singh* with him) (*Logan Sabapathy & Co*) for the appellants.

Ahmad Moosdeen (*P Paramjothy* with him) (*Chan Moosdeen & Partners*) for the first respondent.

K Anantham (*Skrine & Co*) for the second till eighth respondents.

Cur Adv Vult

Gopal Sri Ram JCA:

Preliminary

Despite the heat generated during argument, I apprehend that the short question at issue in this appeal to be whether it was the appellants or the respondents who were in breach of their contractual obligations. The resolution of that question does not, in my opinion, involve any novel or difficult point of principle. Rather is this a case that calls for an application of settled principles of law to particular facts. The background against

which the question central to this appeal falls to be resolved may be shortly stated.

The background

This appeal arises out of the trial of two consolidated actions. I must mention that there are ten other appeals in respect of connected matters and interlocutory applications. These were adjourned with the consent of all counsel who were agreeable that our views upon the present appeal will have a direct effect upon the outcome of some, if not all, of the other appeals.

The first appellant was at all material times the owner of about 400 acres of land known as Kayangan Heights. The land in question was sub-divided into about 612 vacant bungalow lots. Of these, the first appellant sold 235 lots to individual purchasers. It sold a further 372 lots to the respondents. The transaction between the appellants and the respondents was carried into effect through the mechanics of a number of written agreements. Of these, four are 5 February 1996. Since so much turns upon the construction to be placed upon these agreements, it is necessary to briefly describe each of them.

To begin with, there is the sale and purchase agreement ('the sale agreement'). The parties to this are the first appellant and the first respondent. Pursuant to the terms of the sale agreement the first appellant sold the bungalow lots to the first respondent at RM10.04psf. The total purchase price for the sale works out to RM90m.

The second set of documents is seven agreements for the sale and purchase of the several bungalow lots to seven different private limited companies. The seven companies are all nominees of the first respondent. They are its alter ego. About this there is no dispute.

The third document is called a Turnkey contract. Under the terms of this agreement, the first respondent appointed the second appellant as the contractor to carry out the remaining infrastructure works for the land in question for the sum of RM71,372,682.

The next document is the master supplementary agreement ('the supplementary agreement') entered into between the first and second appellants of the one part and the first respondent of the other part. It is common ground that the first respondent represented the seven companies in the supplementary agreement. The supplementary agreement so recites.

So much for the first four documents of even date.

There are three other agreements. First, there is an indemnity dated 5 February 1996. The parties to this are the third appellant and one Lee Kam Sun of the one part and the first respondent of the other part. Since part of the relief granted by the learned judge relates to the enforcement of this document it is necessary to say something about it. According to that document, the third appellant and her co-director agreed to keep the first respondent:

> … indemnified against all actions, proceedings, claims, demands, damages, costs and expenses, including but not limited to any claims, actions or proceedings brought by the purchasers of bungalow lots at Kayangan Heights sold by Sri Kelangkota-Rakan JV Sdn Bhd or their contractors or their sub-contractors whatever which you or your representatives may be liable to or incur by reason of you entering into the sale agreement with the said Sri Kelangkota-Rakan JV Sdn Bhd and the Turnkey contract with Kayangan Development & Construction Sdn Bhd.

I will return to the effect given to these words by the learned judge later in this judgment.

The next document I must mention is the supplementary agreement dated 18 July 1996 between the second appellant and the first respondent. This agreement varied the Turnkey contract. Nothing turns upon this variation.

Finally, there is the second supplementary agreement. This is an important document. Its terms were referred to at some length by counsel on both sides of the Bar. For that reason I must deal with it at some length at the appropriate place in this judgment. I merely mention its existence for the moment.

The construction point

I must now address two issues touching upon these agreements. They were placed at the forefront of the appellants' argument and occupied so much of our time. The first concerns the methodology for the construction of the agreements in this case. In particular, whether they ought to be read individually or together, as a whole. The second issue is whether the correspondence exchanged between the parties during the course of negotiations may be looked at as a guide to the interpretation of the agreements in this case. The appellants have criticized the approach taken by the learned judge upon both these issues.

It is their counsel's argument that if the judge had directed himself accurately on these two issues, he would have been driven to the following conclusions, namely: (i) that the Turnkey contract was a mere facade to cloak an attempt by the first respondent to evade the payment of real property gains tax; and (ii) that the entire transaction was therefore purely one for the sale of land at RM18psf, from the first appellant to the first respondent. To use the language of Mr Logan Sabapathy, counsel for the appellants in the court below, 'the real commercial bargain' between the parties was a contract for the sale and purchase of the subject property at RM18psf and nothing else.

I will now deal with each of these issues separately.

Reading together or separately?

The first point is about the reading of the agreements. According to the appellants, the learned judge applied a dual and unequal approach to the question of interpretation. They complain that when he construed the

agreements, he treated them as separate documents but that when he came to granting relief to the seven companies, he read all the agreements together. Mr Narayanan, counsel for the appellants, has argued that this duality of approach has resulted in a miscarriage of justice.

For the first respondent, Mr Ahmad Moosdeen has argued that the learned judge did not misdirect himself in the manner complained of by the appellants. He and Mr Anantham for the remaining respondents accept that the agreements are to be read together, but that when this is done, the result is of no moment to the appellants.

I have carefully read the judgment of the learned judge but am unable to discover any direction on the point. Nowhere has he said that the four agreements are to be read together. Neither has he said that they ought to be read separately. What is plain is that he directed his mind only to the sale agreement and the Turnkey contract. This is because he focussed on the appellants' 'real commercial bargain' argument. His approach comes across in the following passage in his judgment:

> Mr Logan Sabapathy, learned counsel for the defendants, submitted that the two written agreements are not binding on them but held on to 'the real commercial bargain' in that the plaintiff and the seven companies had agreed to purchase the defendants' bungalow lots at RM18psf. Learned counsel for the defendants argued that 'the real commercial bargain' should prevail as the contractual relationship between the plaintiff and the first and second defendants is governed by 'composite sale agreements' and not the two written agreements.
>
> *It is my specific finding that 'the real commercial bargain' has not been set out in the two written agreements and does not appear to be within the contemplation of the parties thereto.*
>
> It seems to me that the defendants' reliance on 'the real commercial bargain' contradicts or attempts to vary the two written agreements in particular:
>
> (1) Clause 2.1 of the sale agreement expressly states that the plaintiff has purchased the bungalow lots at RM10.04psf while 'the real commercial bargain' alleges that the purchase price is RM18psf;
>
> (2) The Turnkey contract expressly says that the plaintiff has appointed the second defendant to continue to build infrastructure works in Kayangan Heights for approximately RM71m, while 'the real commercial bargain' alleges that the second defendant was never involved in building the infrastructure works and that the RM71m was part of the purchase price of RM18 per sq foot for bungalow lots. (Emphasis added.)

In my judgment, there is merit in the appellants' argument that the agreements in this case must be read together. Indeed, as I have said, the respondents make no issue about the point at all. When the agreements are read together, what comes across with sharp clarity is the fact that a breach of any of the terms of one of the agreements triggers a breach of all the agreements. This is achieved by cl 2 of the supplementary agreement. In other words, all these agreements are to be looked upon as forming part and parcel of one and the same transaction.

A So far as principle is concerned, I consider it beyond argument. Rather than resorting to an attempt to paraphrase, I will quote what Fletcher Moulton LJ, said upon the subject in *Manks v Whiteley* [1912] 1 Ch 735 at p 754:

> … where several deeds form part of one transaction and are
B contemporaneously executed they have the same effect for all purposes such as are relevant to this case as if they were one deed. Each is executed on the faith of all the others being executed also and is intended to speak only as part of the one transaction, and if one is seeking to make equities apply to the parties they must be equities arising out of the transaction as a whole.

C *Manks v Whiteley* has been applied by our courts. Thus, in *Mohamed Isa & Ors v Abdul Karim & Ors* [1970] 2 MLJ 165 at p 170, Raja Azlan Shah J, (as he then was) said:

> It is a settled rule of construction that where several documents forming part of one transaction are executed contemporaneously, all the documents must be read together as if they are one (see *Manks v Whiteley* [1912] 1 Ch 735).
D This principle was followed in *ldris bin Haji Mohamed v Ng Ah Siew* [1935] MLJ 257, where Terrell J at p 261 said:
>
> > 'It is a well known rule of construction that where the arrangement between parties is contained in several documents all executed simultaneously, all the documents must be read together to ascertain the intention of the parties, and it is a corollary from this that the intention
> E must be gathered from the documents as a whole. It has been held, for example, that when a bill of sale and a mortgage of a reversionary interest were executed simultaneously and related to the same debt, the bill of sale could be defeated by a condition contained only in the mortgage, *Edwards v Marcus* (1894) 1 QB 587 (see also the dissenting judgment of Fletcher Moulton LJ in *Manks v Whiteley*, which was approved on appeal to the
> F House of Lords, sub-nominee *Whiteley v Delaney* [1914] AC 132).'

The exclusionary rule

I have said that the agreements in this case must be read as forming one transaction. The question then arises: what is that transaction?

G According to the appellants if you look at the correspondence exchanged between the parties during negotiations, you will see that it is nothing more than a sale of bungalow lots at RM18psf. According to the respondents, it is much more than that. They say that the appellants had substantial obligations under the Turnkey contract. It was not pure window dressing. It was a contract that was designed to be acted upon and was acted
H upon by the parties.

In the court below, the point did not go beyond the realm of admissibility. In a passage in his judgment following that which I earlier quoted, the learned judge held that the appellants' argument about 'the real commercial bargain' offended the parol evidence rule housed in s 92 of the
I Evidence Act 1950 ('the Act'). Having held that the 'real commercial bargain' argument was inadmissible, the learned judge proceeded to enforce the terms of the Turnkey contract.

Counsel for the appellant made two submissions on this point which I consider to be important. His first submission is that evidence is admissible to show that a transaction is a sham. He says that he is using the expression 'sham' in the limited sense ascribed to it by Lim Beng Choon J, in *Kuppusamy v Anggamah & Anor* [1992] 1 MLJ 602 at p 620:

> Even if I am wrong in holding that the plaintiff's June 1986 agreement is invalid, I have no hesitation in holding that the said tenancy agreement is a sham agreement deliberately entered into between Ramasamy and the plaintiff to deprive the rights of the second defendant as landlord of the plaintiff. *'Sham' has been defined as 'a false label in which the express purpose does not correspond with the true purpose'.* The clearest statement of the principle is that provided by Diplock LJ in *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 at p 802:
>
> > '*... acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create.* But one thing, I think, is clear in legal principle, morality and the authorities (see *Yorkshire Railway Wagon Co v Maclure* (1882) 21 Ch D 309 and *Stoneleigh Finance Ltd v Phillips* [1965] 2 QB 537), that *for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a 'shammer' affect the rights of a party whom he deceived.*'
>
> The court in order to determine whether a document or transaction is a sham ought to have regard to all the circumstances — both before and at the time of the execution of the document or creation of the transaction. (Emphasis added.)

Mr Narayanan says that having regard to what was said by Diplock LJ, in *Snook*'s case, the learned judge was plainly wrong in holding that 'the real commercial bargain' between the parties is inadmissible as offending s 92 of the Act. He makes the further point that if you add the sums provided under the sale agreement and the Turnkey contract and divide that by the total area of the subject property, you will arrive at the figure of RM18psf. This, he says, brings home the point that this whole transaction was a sale of land.

Before I express my opinion on this part of the case, I think that I must say that the judgment of Ong Hock Thye J, (as he then was) in *Michael v Soon Teck Finance Co & Anor* [1962] MLJ 53 to be of particular assistance upon the subject. In that case (at p 56 of the report) the learned judge applied the following test propounded by Lord Goddard in *Polsky v S and A Services* [1951] 1 All ER 185 at p 189:

> It seems to me that one of the most satisfactory ways of deciding what the true nature of the transaction was is to see whether the documents themselves accurately set out the deal between the parties as it took place and at the time when it took place or whether the facts, or some of them, therein recorded do not truly represent that which happened, but give the transaction what I may call an innocent appearance.

That brings me to the question of admissibility. In my judgment, s 92 of the Act had nothing whatever to do with this case. The judge was in error when he thought that it did. The appellants were not seeking to admit evidence to contradict the terms of the agreements that had been entered into. They wanted the court to see the real transaction behind the facade of the agreements. That this is permissible is settled by high authority. I will not go through all the cases here. Suffice that I mention just one.

In *Gangabai v Chhabubai* AIR 1982 SC 20 at p 23, the Supreme Court of India rendered the following exposition on s 92 of the Indian Evidence Act, upon which our statute is based:

> The next contention on behalf of the appellant is that sub-s (1) of s 92 of the Evidence Act bars the respondent from contending that there was no sale and, it is submitted, the respondent should not have been permitted to lead parol evidence in support of the contention.
>
> Section 91 of the Evidence Act provides that when the term of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself. Subsection (1) of s 92 declares that when the terms of any contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms. And the first proviso to s 92 says that any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law. It is clear to us that the bar imposed by sub-s (1) of *s 92 applies only when a party seeks to rely upon the document embodying the terms of the transaction*. In that event, the law declares that *the nature and intent of the transaction must be gathered from the terms of the document itself* and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. *The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham*. Such a question arises when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document, was entered into between the parties: *Tyagaraja Mudaliyar v Vedathanni* AIR 1936 PC 70. (Emphasis added.)

Parties to a transaction may disguise its true nature and purport by whatever means available to them. Yet, the court will tear away the disguise and reveal to the world at large the true arrangement arrived at between the parties. It is important for reasons of public policy that the court is seised of

this power. Were it not so, the law would be lending its aid to enforce pretended and not real obligations.

I now turn to counsel's second submission on this part of the case. It is that the factual matrix forming the background to the agreements in this case may be prayed in aid to their interpretation. The correspondence passing between the parties during negotiations he says forms part of the background and may therefore be prayed in as an aid to construction.

Now, there is another case that falls outside s 92 of the Act. Although it is sometimes referred to as the rule in *Prenn v Simmonds*, it is principle of much greater antiquity. It is a rule of limited application, calling for caution in its use.

In *Prenn v Simmonds* [1971] 3 All ER 237 at p 240, Lord Wilberforce explained the rule and its rationale as follows:

> I may refer to one other case to dispel the idea that English law is left behind in some island of literal interpretation. In *Utica City National Bank v Gunn* (1918) 118 NE 607, the New York Court of Appeals followed precisely the English line. Cardozo J in his judgment refers to 'the genesis and aim of the transaction' citing Stephen's Digest of the Law of Evidence, and Wigmore on Evidence. Surrounding circumstances may, he says, 'stamp upon a contract a popular or looser meaning' than the strict legal meaning, certainly when to follow the latter would make the transaction futile. 'It is easier to give a new shade of meaning to a word than to give no meaning to a whole transaction.' The whole judgment, as one may expect, combines classicism with intelligent realism.
>
> So I think that Dr Simmonds gains little support from authority. On principle, the matter is worth pursuing a little, because the present case illustrates very well the disadvantages and danger of departing from established doctrine and the virtue of the latter. There were prolonged negotiations between solicitors, with exchanges of draft clauses, ultimately emerging in cl 2 of the agreement. The reason for not admitting evidence of these exchanges is not a technical one or even mainly one of convenience (although the attempt to admit it did greatly prolong the case and add to its expense). It is simply that such evidence is unhelpful. *By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are changing and until the final agreement, although converging, still divergent. It is only the final document which records a consensus. If the previous documents use different expressions, how does construction of those expressions, itself a doubtful process, help on the construction of the contractual words?* If the same expressions are used, nothing is gained by looking back; indeed, something may be lost since the relevant surrounding circumstances may be different. And at this stage there is no consensus of the parties to appeal to. *It may be said that previous documents may be looked at to explain the aims of the parties. In a limited sense this is true; the commercial, or business object, of the transaction, objectively ascertained, may be a surrounding fact.* Cardozo J thought so in the *Utica Bank*'s case. *And if it can be shown that one interpretation completely frustrates that object, to the extent of rendering the contract futile, that may be a strong argument for an alternative interpretation*, if that can reasonably be found. But beyond that if may be difficult to go; it may be a matter of degree, or of judgment, how far one interpretation, or another, gives effect to a common intention; the parties, indeed, may be pursuing that intention with differing emphasis, and hoping to

> achieve it to an extent which may differ, and in different ways. The words used may, and often do, represent a formula which means different things to each side, yet may be accepted because that is the only way to get 'agreement' and in the hope that disputes will not arise. The only course then can be to try to ascertain the 'natural' meaning. Far more, and indeed totally, dangerous is it to admit evidence of one party's objective — even if this is known to the other party. However strongly pursued this may be, the other party may only be willing to give it partial recognition, and in a world of give and take, men often have to be satisfied with less than they want. So, again, it would be a matter of speculation how far the common intention was that the particular objective should be realized.
>
> …
>
> In my opinion, then, evidence of negotiations, or of the parties' intentions, and a fortiori of Dr Simmonds's intentions, ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction.

Prenn v Simmonds was applied in *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243 at p 247. There, Mohamed Azmi FJ, said:

> As far as our law is concerned, the exclusion of oral by documentary evidence, is governed by ss 91 to 99 of the Evidence Act 1950. Section 91 provides that the contents of a document must be proved by the document itself, and s 92 provides that subject to certain provisoes, no evidence of any oral agreement or statement shall be admitted for the purpose of contradicting, varying, adding to, or subtracting from its terms. Section 93 further provides that when the language used in a document is on its face ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects. But Mr Lim Kean Chye has placed reliance on the case of *Prenn v Simmonds* [1971] 3 All ER 237, 241 where Lord Wilberforce had said per curiam at p 241 that, 'evidence of negotiations, or of the parties' intentions ... ought not to be received, and evidence should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the 'genesis' and objectively the 'aim' of the transaction'. It should be noted that in *Prenn*'s case, the House of Lords refused to extend the court's interpretative power by allowing pre-contract negotiations to be looked at in aid of the construction of a written document, by emphasizing 'the disadvantages and danger of departing from established doctrine and the virtue of the latter'. For the construction of a written agreement the established doctrine is firstly to exclude evidence of negotiations leading up to the contract on the ground that it is only the final agreement which records a consensus and as such evidence of negotiations is unhelpful; and secondly to exclude evidence of the parties' subjective intentions so that any individual purpose which either of them hopes to achieve by the agreement and their own interpretation and understanding of the agreement is not admissible. As against this, evidence of surrounding circumstances and factual background have always been admissible.

In *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282, the defendant guarantors relied on the contents of a pre-contractual letter as qualifying the nature of their obligations under a guarantee. It was held by the Federal Court that the letter in question did not 'fall within the category of

negotiations as to be caught by the prohibitory provisions of the Act but gives factual background which is certainly admissible' (per Raja Azlan Shah CJ (Malaya) at p 283.) Not surprisingly, the appellants before us place much reliance upon this decision in support of their argument that the letters passing between the parties solicitors prior to the execution of the several agreements in the present case ought to be examined and taken into account when interpreting those agreements.

Now, I have examined the letters referred to by counsel for the appellants. Some of these are quite useless because, as pointed out by En Ahmad Moosdeen, they show the parties altering their respective positions at different stages of the negotiations. New terms were being formulated and amendments were being suggested to some of the existing terms. Therefore, to say that all these letters are admissible would not, in my view be a fair application of the rule in *v Simmonds* to the fact pattern before us. That, with respect to Mr Narayanan, would amount to admitting evidence of negotiations which is something that s 92 of the Act prohibits. But I am prepared to accept that there are in the record provided to us some letters that are clearly admissible in support of the appellants' contention that the real commercial bargain between the parties was something other than what is set out in the Turnkey contract.

The only letter that brings the case closest to the point at which the appellants wish to state their case was written by their solicitors on 9 January 1996. There are many matters that the letter makes reference to that are not helpful for present purposes. But there is one paragraph in it that is relevant. This is what it says:

> The final purchase price is now RM180,043,146 (subject to variation). The sale agreement will still be fixed at RM90m. Thus, the Turnkey contract has a residual value of RM90,043,146 of which RM50m is payable on execution, RM30m on certification and RM10,043,146 on presentation.

Counsel poses the question: if this was a genuine Turnkey contract, why were the parties working on a global sum worked out against the total sale price of the land? He says that this shows that there was no genuine Turnkey contract entered into between the parties. The so-called Turnkey contract was nothing more than a device to disguise what in essence was a sale of the bungalow lots at RM18 per square foot.

In response to this submission, En Ahmad Moosdeen argues that the letter relied upon by the appellants was not the end product of the negotiations between the parties. It was a letter, he says, that was written very early in the negotiations. He says that the letters exchanged at a later stage in the negotiations reveal that the position changed. The price was different. And there were additional obligations that were introduced as part of the valuable consideration for this transaction. He adds that the letters written by the appellants after the agreements had been entered into reveal that they accepted the position that they had obligations under the Turnkey contract. Counsel argues — and this is a distinct and separate argument — that the post-agreements correspondence demolishes the suggestion that the Turnkey contract was a sham.

Now, if you look at the later letters and at the final agreements in this case, you will find that the point taken by counsel for the first respondent has been made out. I do not see any point in quoting from all of them. Suffice to say that they show that the price for the Turnkey contract was amended during negotiations and that there was a necessity for the provision of a bill of quantities in respect of the work undertaken by the appellants under the Turnkey contract. Further, it is noteworthy that the respondents secured for themselves a very valuable right in the form of an assignment of the mutual covenants that the appellants had obtained from the 235 purchasers to whom the appellants had previously sold bungalow lots. There is therefore much force in the argument of counsel for the first respondent that the Turnkey contract did in truth and in fact create mutually enforceable legal obligations by which the parties considered themselves to be bound.

The appellants' subsequent conduct

That brings me to the next argument. This forms the second string to En Ahmad Moosdeen's bow. Counsel submits that nowhere in the correspondence following the execution of the agreements did the appellants take the point that the Turnkey contract was a sham and was not binding upon them.

To this Mr Narayanan made a startling response. He said that the appellants' case was not that the Turnkey contract created no obligations upon his client, the second appellant, in respect of the construction of the infrastructure for the land in question. He said that he was merely on the authority of *Snook* that the Turnkey contract was a sham.

I must be forgiven for being unable to appreciate this argument. Either the Turnkey contract is a sham, in which event it is not binding upon the parties as a Turnkey contract on the basis of what was said in *Snook* and the allied cases, or it is a valid and binding contract that imposed enforceable obligations. It cannot be both a sham and binding as well.

Now, it must be said in fairness to the respondents that there is abundant evidence, both oral and documentary, showing that the post-agreements conduct of the appellants points to an acceptance on their part that the Turnkey contract was not a sham but that it created binding obligations. But, is the subsequent conduct of a party admissible to interpret a contract? That question must, I think, receive a negative response. Were it otherwise, a contract would mean something today and something else tomorrow. The point has been settled by high authority.

In *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] 1 All ER 796 at p 798, Lord Reid said:

> Of course the actings of the parties (including any words which they used) may be sufficient to show that they made a new contract. If they made no agreement originally as to the proper law, such actings may show that they made an agreement about that at a later stage. Or if they did make such an agreement originally such actings may show that they later agreed to alter it. But with regard to actings of the parties between the date of the original

> contract and the date of Mr Underwood's appointment, I did not understand it to be argued that they were sufficient to establish any new contract, and I think that they clearly were not. As I understood him, counsel sought to use those actings to show that there was an agreement when the original contract was made that the proper law of that contract was to be the law of England. I must say that I had thought that it now well settled that it is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.

In *L Schuler AG v Wickman Machine Tool Sales Ltd* [1973] 2 All ER 39 at p 53, Lord Wilberforce said:

> In my opinion, subsequent actions ought not to have been taken into account. The general rule is that extrinsic evidence is not admissible for the construction of a written contract; the parties' intentions must be ascertained, on legal principles of construction, from the words they have used. It is one and the same principle which excludes evidence of statements, or actions, during negotiations, at the time of the contract, or subsequent to the contract, any of which to the lay mind might at first sight seem to be proper to receive. As to statements during negotiations this House has affirmed the rule of exclusion in *Prenn v Simmonds*, and as to subsequent actions (unless evidencing a new agreement or as the basis of an estoppel) in *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd*.

It will be noticed that Lord Wilberforce left the door slightly ajar by reserving estoppel as an exception to the rule as to subsequent conduct. This has enabled us to look at subsequent conduct, not to interpret an agreement, but to prevent parties from asserting that an agreement had a different meaning from the meaning that they had proceeded upon, albeit mistakenly. In such circumstances, neither side will be permitted to say that the document meant something else on its true construction.

The authorities on the point are legion. Some of the more leading cases were examined by the Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331. One of the arguments raised in that case was that the agreement between one Chemitrade Sdn Bhd and the respondent was not an assignment at all. The court dealt with that argument as follows (at p 349):

> In the present case, there are contemporaneous documents to suggest that the appellant, Chemitrade, and the respondent proceeded upon the assumption — an erroneous assumption of law — that the factoring agreement was indeed a good and valid assignment. The respondent's letter to the appellant of 14 February 1990, which we have earlier reproduced, is a document in point. The letter says that there has been an assignment under the factoring agreement. It was open at that stage for the appellant to dispute the construction which the respondent placed upon that agreement. But it did not do so. Instead it chose to go along with the respondent's interpretation of the document. Can it now say otherwise? We do not think it can. It would be unjust and unconscionable to permit the appellant to now challenge the meaning which the parties gave to the document.

So too here. The appellants did not at any point prior to the delivery of the pleadings in this case allege that the Turnkey contract did not create obligations upon the second appellant (or indeed the first appellant) to carry out the infrastructure works in accordance with the plans and specifications set out in the relevant plans. It is clear from the evidence the first respondent paid over a sum of RM140m to the appellants for the bungalow lots. There is no doubt in my mind that they would not have done so if the appellants had asserted from the very beginning that the Turnkey contract was a mere sham. Looking at the evidence in its totality, the question as to whether the Turnkey agreement was a sham should be answered in the negative.

To sum up, the judge was wrong in holding that evidence was not admissible to reveal the real commercial bargain between the parties. He was also wrong in not reading all the ten agreements together. But these errors make no difference to the final result upon this part of the case. Even if the judge had done all that was required of him, he would have — as would have any reasonable tribunal properly directing itself — arrived at the conclusion that the Turnkey contract as drawn up and executed accurately reflected the true commercial bargain between the parties and that there was no other real commercial bargain.

The only question, therefore, is whether it is the appellants or the first respondent who was in breach of contract. And it is to that question that I must now turn.

Breach of contract

General

I must say at once that in an action founded on contract, the issue as to which of the contracting parties is in breach is a question of fact that depends for its resolution upon the facts and circumstances of the particular case. If the contract is in writing, the first task of the court is to interpret the terms of the document to ascertain its meaning in the context of determining the nature of the particular obligations the breach of which is complained. The next task is to determine on the peculiar facts of the particular case as to whether the breach complained of did occur. In the ordinary course of things, it is the pleaded case of each party that will identify the obligation that required performance, the act or conduct that is said to constitute the breach of that obligation and (in the case of a defence), any justification proffered in support of the course of action complained of. Since, in the court below, the first respondent was the plaintiff, I will deal with its case before considering the case put forward by the appellant.

The respondents' case

The pleadings and written argument delivered in the court below are not open to criticism on grounds of brevity. In them, each side claims that the other acted in breach of contract. It is therefore necessary to examine the stand taken by the respective litigants. The main points of the first respondent's case may be summed up as follows.

There was an obligation on the appellants to build roads and carry out other infrastructure works in accordance with the plans referred to in the schedule to the Turnkey contract. The appellants were not entitled to effect any amendments to the plans except with the respondent's consent. The appellants did carry out certain infrastructure works. All these works were certified by the relevant local authority as being in accordance with the approved plans. However, the so-called approved plans were not all in accordance with the plans annexed to the Turnkey contract. The appellants had, without the first respondent's knowledge, submitted amendments to the original plans and had then proceeded to carry out works in accordance with these new plans. The appellants had repeatedly assured the respondents that rectification would take place. As matters turned out, there was no rectification, and so, the first respondent was entitled to terminate the agreements and to have possession. So much for the first respondent's case.

The appellants' case

The appellants' case was conveniently summarized by Mr Narayanan as follows. The appellants had done the work required of them under the Turnkey contract. They had also fulfilled their obligations under the sale agreements they had with all the respondents. It follows that the respondents were obliged to pay to the appellants the sums due under the relevant agreements, in particular, under the second supplementary agreement. However, the first respondent refused to pay the sum thus due and instead treated the appellants as being in default. Accordingly it is the first respondent and not the appellants who are in breach of the Turnkey contract. The first respondent's breach triggered an overall breach of all the relevant agreements which all the parties had with each other.

Further, for a number of reasons, it was not open to the first respondent to argue that the appellants had failed to carry out the works according to specifications. First, the respondents were wrong in confusing the layout plan (exh P11) with the infrastructure plans. The appellants were only obliged to carry out their works in accordance with the latter and not the former. This, the appellants had done, as evidenced by the approvals granted to the works by the relevant local authority. Second, the respondents had collected payments from its sub-purchasers on the strength of the infrastructure works carried out by the appellants. The respondents had therefore taken the benefit of the works in question. It was, therefore, no longer open to them to complain that the works were not in accordance with the relevant plans. Lastly, the allegation of sub-standard work is completely answered by the second supplementary agreement. That document only makes mention of payments being due for water reticulation works. It must therefore be assumed that all other work had been satisfactorily done. Otherwise, the first respondent would not have agreed to pay the sums set out in the second supplementary agreement. Hence, there was, in the circumstances, convincing evidence of acquiescence on the

part of the respondents that the judge had overlooked. It followed that it was no longer open to the respondents to complain about any of the works in question.

I now turn to the respondents' response to these arguments.

The response

Counsel for the first respondent accepts that his client had paid over monies to the appellants and had entered into the second supplementary agreement despite the works not being in accordance with the agreed specifications. He however argues that there are good reasons for his client in acting as it did. In the first place, the first respondent had, through its consultants at the several meetings, raised the question of the infrastructure works not being in accordance with the specifications. On each occasion the appellants had assured the respondents that corrective works would be undertaken if the work was unsatisfactory. The first respondent thus influenced by the promises of the appellants, agreed in good faith to enter into the second supplementary agreement. Secondly, by the time the second supplementary agreement was drawn up and executed, the respondents had paid the appellants substantial sums of money. It therefore made no commercial sense to terminate the agreements at that stage and look for another contractor to carry on with the work. It only became necessary to terminate the agreements when there was persistent neglect on the part of the appellants to fulfil their obligations under the Turnkey contract. Thirdly, the second supplementary agreement itself made provision for the completion of the infrastructure works in accordance with the agreed specifications, so that there was no question of that matter having been completely closed by that stage of the events.

The questions in this appeal

Now, the way in which the parties have gone forward on their respective cases makes it plain that each of the contracting parties is blaming the other for not fulfilling its obligations while justifying its own actions. The judge in the court below therefore had before him a typical, run-off-the-mill, case of breach of contract. His function was to examine the grounds of justification advanced by each side with a view to identifying the guilty party, ie the party who acted in breach of contract.

The points of contention between the rival litigants raise two questions. First, was the learned judge right in holding that it was the first and second appellants who acted in breach of contract? Second, was the learned judge right in awarding the relief that he did? There are certain subsidiary issues inherent in each of these questions. These include such matters as the respondents' acquiescence in the state of affairs that persisted. I will address these separately. But before answering each of the questions posed, I think it necessary to keep in mind some of the relevant clauses in the agreements that were entered into by the parties.

Some relevant clauses

The first two are in the Turnkey contract. They are cll 3.2 and 17.1(d) and read as follows:

> 3.2 Any changes in the works from the infrastructure plans, or any drawings and specifications as mentioned in cl 3.1 above prepared by the relevant consultants for submission to the relevant authorities, must receive the prior approval from the owner or any other suitably qualified persons appointed by the owner to undertake such review. The contractor shall give a copy each of all changes in the infrastructure plans, drawings and specifications above-mentioned to the owner before submitting the same to the relevant authorities for approval.
>
> 17.1 Without prejudice to any other rights or remedies which the owner may have herein or by law conferred, in the event the contractor shall make default in any one or more of the following respects, that is to say: …
>
> (d) if the contractor persistently neglects without reasonable cause to carry out its obligations hereunder;
>
> then the owner may serve on the contractor a notice by registered post specifying the default, and if the contractor shall continue such default for thirty (30) days after receipt of such notice then the owner may thereupon by a notice sent by registered post determine this contract.

It is under this clause that the first respondent terminated the Turnkey contract.

Next there is cl 12.1 of the sale agreement between the first appellant and the first respondent. And it is in the following terms:

> 12.1 Unless the contrary is or shall be agreed upon by the parties hereto the vendor (the first appellant) shall deliver vacant possession of the sale lots to the purchaser (the first respondent) on the completion date.

Finally, there is cl 2 of the supplementary agreement. It reads:

> 2 Notwithstanding anything contained to the contrary in the sale agreement, the seven sale agreements and the Turnkey contract, in the event of any default occurring in either or both the sale agreement, the seven sale agreements and/or the Turnkey contract as the case may be, such event shall be deemed and be taken to be an event of default under both the sale agreement, the seven sale agreements and the Turnkey contract.

Who was in breach?

The evidence led on the question of breach is voluminous. There is a large body of oral evidence accompanied by several thousands of pages of documents. The task of sifting the evidence must have presented an enormous task to the learned judge. But it must be said in fairness to him that he carried out his task as required by law. In other words, there was judicial appreciation of the evidence by the learned judge upon the issues that fell for decision.

Counsel on both sides took us through the most important areas of the printed and documentary evidence. Having reviewed the material placed

before us and having considered the oral and written argument presented to us, I am satisfied that in essence the question that falls to be answered is one of fact.

The finding by the learned judge that the first and second appellants had persistently neglected to carry out the infrastructure works in accordance with the plans originally shown to the first respondent under the Turnkey contract is consistent with and is amply supported by the evidence on record. There is also cogent evidence to support the conclusion that the appellants had acted in breach of their obligations under the agreements by submitting amended plans without the prior approval of the first respondent and then constructing the infrastructure works in accordance with those amended plans. Further, an examination of the evidence, both oral and documentary, leaves me convinced that there is merit in the arguments of counsel for the first respondent that his client was at all material times unaware that the appellants had amended the relevant plans without first obtaining the first respondent's prior approval. Additionally, there is ample material on record to justify the conclusion that the second appellant neglected without reasonable cause to carry out its obligations under the Turnkey contract.

In the light of the impression that I have gained from the totality of the evidence, I am satisfied that the learned judge's finding that it was the first and second appellants who were in breach of contract is free from any appealable error. Further, on the facts as found by the learned judge, I am driven to the conclusion that the first respondent was justified in terminating the Turnkey contract.

The acquiescence point

That now brings me to the appellants' submissions on the issue of acquiescence. The law on the point is now fairly well settled. At one time it was thought that the issue could only be determined by satisfying the five probanda laid down by Fry J, in *Willmott v Barber* (1880) 15 Ch D 96. It is now plain that there is no straightjacket approach to the question. Like all other equitable doctrines, it is to be approached in a broad and flexible manner according to the justice and circumstances of the particular case. That appears quite clearly from the judgment of Oliver LJ in *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 2 All ER 650 at p 665:

> We were again referred to many authorities on this subject and to the debate which has taken place whether, in order to succeed in a plea of acquiescence, a defendant must demonstrate all the five probanda contained in the judgment of Fry J in *Willmott v Barber* (1880) 15 Ch D 96 (see the recent judgment of Robert Goff J in *Amalgamated Investment and Property Co Ltd (in liquidation) v Texas Commerce International Bank Ltd* [1981] 1 All ER 923, [1981] 2 WLR 554). Whether all five of those probanda are necessary or not, counsel for the plaintiffs submits that to succeed the defendants must at least establish three things. They must show, first, that the defendants have been acting under a mistake as to their legal rights. That, in the instant case, must mean that they were unaware that what they were doing (that is to say, carrying on their business under the name in which they had been incorporated with the active

assistance of the plaintiffs' predecessors) constituted any invasion of the plaintiffs' rights. Second, they must show that the plaintiffs encouraged that course of action, either by statements or conduct. Third, they must show that they have acted on the plaintiffs' representation or encouragement to their detriment.

None of these three essentials, submits counsel, has been pleaded or proved in the instant case. I will consider that submission in a moment, but I must first notice the submission of junior counsel for the defendants that in any event these three allegedly essential ingredients do not constitute the test for a successful plea of acquiescence or estoppel, at any rate as the law has now developed. The true principle, counsel suggests, is that to be found in the judgment of the board in *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221 at 239–240 delivered by Sir Barnes Peacock and cited with approval by Lord Blackburn in *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 at 1279:

> 'The doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.'

After quoting that passage Lord Blackburn continued (at pp 1279–1280):

> 'I have looked in vain for any authority which gives a more distinct and definite rule than this; and I think, from the nature of the inquiry, it must always be a question of more or less, depending on the degree of diligence which might reasonably be required, and the degree of change which has occurred, whether the balance of justice or injustice is in favour of granting the remedy or withholding it. The determination of such a question must largely depend on the turn of mind of those who have to decide, and must therefore be subject to uncertainty; but that, I think, is inherent in the nature of the inquiry.'

To this, counsel for the plaintiffs retorts that that applies only where you are considering the doctrine of laches or acquiescence in relation to the assertion of equitable rights and not where you are considering the enforcement by equitable means of legal rights; and we were regaled with authorities on both sides for the purpose of establishing whether a plaintiff in a passing-off action is protecting a legal right or an equitable right.

I have to confess that I detect in myself, despite the erudition displayed by both counsel, a strong predilection for the view that such distinctions are both archaic and arcane and that in the year 1980 they have but little significance for anyone but a legal historian. For myself, I believe that the law as it has developed over the past twenty years has now evolved a far broader approach to the problem than that suggested by counsel for the plaintiff and

one which is in no way dependent on the historical accident of whether any particular right was first recognized by the common law or was invented by the Court of Chancery. It is an approach exemplified in such cases as *Inwards v Baker* [1965] 1 All ER 446, [1965] 2 QB 29 and *Crabb v Arun District Council* [1975] 3 All ER 865, [1976] Ch 179. We have been referred at length to a recent judgment of my own in *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1981] 1 All ER 897, [1981] 2 WLR 576 in which I ventured to collect and review the authorities. I said this ([1981] 1 All ER 897 at pp 915–916, [1981] 2 WLR 576 at p 593):

> 'Furthermore, the more recent cases indicate, in my judgment, that the application of the *Ramsden v Dyson* (1866) LR 1 HL 129) principle (whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial) requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment rather than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.'

Whilst having heard the judgment read by counsel I could wish that it had been more succinct, that statement at least is one to which I adhere.

In a later passage in his judgment, Oliver LJ, approved the approach adopted by the trial judge in that case. This is what he said (at p 668):

> I have to acknowledge my indebtedness to counsel on both sides for some illuminating arguments, but at the end of them I find myself entirely unpersuaded that the judge erred in any material respect. He concluded his judgment in this way on the question of estoppel:
>
> > 'Of course, estoppel by conduct has been a field of the law in which there has been considerable expansion over the years and it appears to me that it is essentially the application of a rule by which justice is done where the circumstances of the conduct and behaviour of the party to an action are such that it would be wholly inequitable that he should be entitled to succeed in the proceeding.'
>
> That, to my mind, sufficiently appears on the facts of this case.
>
> I, too, think that it would be wholly inequitable that the plaintiffs should succeed even if, contrary to the view which I have formed, they had established their primary case. I would, therefore, dismiss the appeal.

The result of the judgment in *Habib Bank*'s case, of the cases therein cited and of the learning that has since flowed, including the decision of our Federal Court in *Boustead Trading* may be summed up thus. A court is duty bound to approach the equitable doctrines of estoppel, laches or acquiescence — call them what you may, for they are all but species of the same genus — in a broad and flexible way, having regard to the justice of the particular case.

The reason for such an approach is rooted in the history of the jurisdiction that the court is called upon to exercise. Whenever called upon to administer equitable concepts, be it doctrinal or remedial, you must not

lose sight of the origins of the jurisdiction of a Court of Equity. It was founded upon a need to mitigate the rigidity of the common law so as to do justice according to the facts of a particular case. And in deciding where the justice of a given case lies, regard must be had to all its relevant circumstances, including the conduct of the respective litigants' at all material times. A litigant whose hands are unclean, in the sense that he is guilty of unconscionable conduct relevant to an issue in immediate dispute, can hardly seek to invoke the protection of an equitable doctrine that is primarily designed to prevent injustice.

Cory v Gertcken (1816) 56 ER 250 and *Overton v Banister* (1844) 67 ER 479 provide ready illustrations of the way in which equity acts. The plaintiffs, while they were minors, induced their trustees into releasing monies by misrepresenting to them that they were adults. Later, upon attaining the age of majority, they sought to charge their trustees with the payments. Their claims were dismissed because of the unconscionability of their conduct. Other examples are provided by the Australian cases of *Kettles & Gas Appliances Ltd v Anthony Hordern & Sons Ltd* (1934) 35 SR (NSW) 108 and *Harrigan v Brown* [1967] 1 NSWR 342.

Now, in the light of the finding by the learned judge that it was the first and second appellants who were in breach of their obligations and taking into account all the circumstances of the case, including the conduct of the appellants in failing to obtain the first respondent's consent to the amendments to the relevant plans, I do not think it just that they should succeed in their plea of acquiescence. In the view I take of the facts before us, I am of the view that the justice of the case favours the respondents rather than the first and second appellants.

Were the appellants entitled to terminate?

It is common ground that the respondents had paid a substantial portion of the sums due to the appellants under the Turnkey contract and the sale agreements. All that remained payable under the second supplementary agreement was a small fraction of the sum of RM141m already paid. The non-payment of the outstanding sum was one of the grounds relied on by the appellants to terminate the entire bargain pursuant to cl 2 of the supplementary agreement. There were other grounds advanced by the appellants to justify their terminating the entire transaction. However, these are rendered irrelevant by the learned judge's finding that it was the appellants who were guilty of breach of contract. The only ground that has been pursued by the appellants in this appeal is that they were entitled to repudiate the whole bargain and call for a re-conveyance of the bungalow lots to themselves for non-payment of the sum due under the second supplementary agreement. The appellants argue for a resolution of this issue in their favour. But there are, in my view, two matters that stand in the way of the appellants' success on the point.

First, the nature of the alleged breach by the respondents, if unjustified, did not, I think, entitle the appellants to terminate the entire bargain they had with the respondents. If they were right in the stand they took, they

were, put at the highest, entitled only to sue and recover the sums due to them. They were not, I think, entitled to put an end to the whole bargain. The agreements, when read as a whole, do not, in my judgment, confer a right on the appellants to put an end to the whole transaction for every breach however trivial.

The point I seek to make is borne out by the decision in *L Schuler A-G*'s case. Schuler was a German company. It manufactured engineering products, including panel presses. It entered into a written agreement with Wickman, an English company. Wickman was given the sole right to sell Schuler products in territory that included the United Kingdom. The agreement contained the following clause: '7 … (a) … [Wickman] will use its best endeavours to promote and extend the sale of Schuler products in the territory; (b) it shall be condition of this Agreement that — (i) [Wickman] shall send its representatives to visit the six firms whose names are listed in the Schedule hereto at least once in every week for the purpose of soliciting orders for panel presses; (ii) that the same representative shall visit each firm on each occasion unless there are unavoidable reasons preventing the visit being made by that representative … 12 … (b) [Wickman] undertakes, at its expense, to look after Schuler's interests carefully and will visit Schuler customers regularly, particularly those customers principally in the motor car and electrical industries whose names are set out on the list attached hereto …'. Clause 11 contained powers for determining the agreement. It set out various dates on which the agreement might by notice be terminated. Clause 11(a) went on to provide that either party might, by notice in writing, 'determine this agreement forthwith if — (i) the other shall have committed a material breach of its obligations hereunder and shall have failed to remedy the same within 60 days of being required in writing so to do …'. Wickman failed to comply with its obligations under cl 7(b). Although in most weeks the named representatives visited the firms listed in the schedule to the agreement, on a few occasions they failed to do so. In consequence Schuler claimed to be entitled to repudiate the agreement. It contended that, since cl 7(b), unlike any other provision of the agreement, was expressed to be a 'condition', one failure by a named representative to visit one of the listed firms gave it an absolute right to treat the contract as at an end. The House of Lords by a majority (Lord Wilberforce dissenting) rejected this argument.

In a passage of critical importance, Lord Reid gave his reasons for holding against Schuler (at p 44):

> So the question is whether a breach of Wickman's obligation under cl 7(b)(i) is capable of being remedied within the meaning of this agreement. On the one hand, failure to make one particular visit might have irremediable consequences, eg a valuable order might have been lost when making that visit would have obtained it. But looking at the position broadly I incline to the view that breaches of this obligation should be held to be capable of remedy within the meaning of cl 11. Each firm had to be visited more than 200 times. If one visit is missed I think that one would normally say that making arrangements to prevent a recurrence of that breach would remedy the breach. If that is right and if cl 11 is intended to have general application then cl 7 must

be read so that a breach of cl 7(b)(i) does not give to Schuler a right to rescind but only to require the breach to be remedied within 60 days under cl 11(a)(i). I do not feel at all confident that this is the true view but I would adopt it unless the provisions of cl 7 point strongly in the opposite direction; so I turn to cl 7. A

Clause 7 begins with the general requirement that Wickman shall 'use its best endeavours' to promote sales of Schuler products. Then there is in cl 7(b)(i) specification of those best endeavours with regard to panel presses, and in cl 12(b) a much more general statement of what Wickman must do with regard to other Schuler products. This intention to impose a stricter obligation with regard to panel presses is borne out by the use of the word 'condition' in cl 7(b). I cannot accept Wickman's argument that condition here merely means term. It must be intended to emphasize the importance of the obligations in sub-cll (b)(i) and (b)(ii). But what is the extent of that emphasis? B C

Schuler maintain that the word 'condition' has now acquired a precise legal meaning; that, particularly since the enactment of the Sale of Goods Act 1893, its recognized meaning in English law is a term of a contract any breach of which by one party gives to the other party an immediate right to rescind the whole contract. Undoubtedly the word is frequently used in that sense. There may, indeed, be some presumption that in a formal legal document it has that meaning. But it is frequently used with a less stringent meaning. One is familiar with printed 'conditions of sale' incorporated into a contract, and with the words 'for conditions see back' printed on a ticket. There it simply means that the 'conditions' are terms of the contract. D

In the ordinary use of the English language 'condition' has many meanings, some of which have nothing to do with agreements. In connection with an agreement it may mean a pre-condition: something which must happen or be done before the agreement can take effect. Or it may mean some state of affairs which must continue to exist if the agreement is to remain in force. The legal meaning on which Schuler rely is, I think, one which would not occur to a layman; a condition in that sense is not something which has an automatic effect. It is a term the breach of which by one party gives to the other an option either to terminate the contract or to let the contract proceed and, if he so desires, sue for damages for the breach. E F

Sometimes a breach of a term gives that option to the aggrieved party because it is of a fundamental character going to the root of the contract, sometimes it gives that option because the parties have chosen to stipulate that it shall have that effect. Blackburn J said in *Bettini v Gye* ((1876) 1 QBD 183 at p 187, [1874–80] All ER Rep 242 at p 244): 'Parties may think some matter, apparently of very little importance, essential; and if they sufficiently express an intention to make the literal fulfilment of such a thing a condition precedent, it will be one.' G

In the present case it is not contended that Wickman's failures to make visits amounted in themselves to fundamental breaches. What is contended is that the terms of cl 7 'sufficiently express an intention' to make any breach, however small, of the obligation to make visits a condition so that any such breach shall entitle Schuler to rescind the whole contract if they so desire. H

Schuler maintain that the use of the word 'condition' is in itself enough to establish this intention. No doubt some words used by lawyers do have a rigid inflexible meaning. But we must remember that we are seeking to discover intention as disclosed by the contract as a whole. Use of the word I

'condition' is an indication — even a strong indication — of such an intention but it is by no means conclusive. *The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear*.

Clause 7(b) requires that over a long period each of the six firms shall be visited every week by one or other of two named representatives. It makes no provision for Wickman being entitled to substitute others even on the death or retirement of one of the named representatives. Even if one could imply some right to do this, it makes no provision for both representatives being ill during a particular week. And it makes no provision for the possibility that one or other of the firms may tell Wickman that they cannot receive Wickman's representative during a particular week. So if the parties gave any thought to the matter at all they must have realized the probability that in a few cases out of the 1,400 required visits a visit as stipulated would be impossible. But if Schuler's contention is right failure to make even one visit entitles them to terminate the contract however blameless Wickman might be. This is so unreasonable that it must make me search for some other possible meaning of the contract. If none can be found then Wickman must suffer the consequences. But only if that is the only possible interpretation.

If I have to construe cl 7 standing by itself then I do find difficulty in reaching any other interpretation. But if cl 7 must be read with cl 11 the difficulty disappears. The word 'condition' would make any breach of cl 7(b), however excusable, a material breach. That would then entitle Schuler to give notice under cl 11(a)(i) requiring the breach to be remedied. There would be no point in giving such a notice if Wickman were clearly not in fault but if it were given Wickman would have no difficulty in shewing that the breach had been remedied. If Wickman were at fault then on receiving such a notice they would have to amend their system so that they could shew that the breach had been remedied. If they did not do that within the period of the notice then Schuler would be entitled to rescind.

In my view, that is a possible and reasonable construction of the contract and I would therefore adopt it. The contract is so obscure that I can have no confidence that this is its true meaning but for the reasons which I have given I think that it is the preferable construction. It follows that Schuler were not entitled to rescind the contract as they purported to do. So I would dismiss this appeal.' (Emphasis added.)

I think that the present case admits of a similar approach. When the agreements entered into by the appellants and the respondents are read as a whole, as I think they ought to be, it is apparent that the parties did not envisage that either side could throw up the whole bargain for an insubstantial breach. The appellants had already received about RM141m from the respondents. All that remained payable was a few million — in the region of about RM12m under the second supplementary agreement. This works out to less than 10% of the total sum already received by the appellants. It appears illogical that in a transaction such as this, a transaction involving a sum in excess of RM100m, that the parties could have intended that the respondents' non-payment of the balance sum, however paltry, due under one or more of the various agreements would confer upon the appellants the unqualified right to throw up the whole

transaction and obtain a re-conveyance unto themselves of the bungalow lots in question. Such a result is wholly unjust and unreasonable. It smacks of punishment. If, of course, that is the only result the parties intended I must fold my arms in abject submission and accept it as precisely what the respondents had accepted. But I do not apprehend the parties to have intended so unreasonable a result. In my judgment, the agreements when read as a whole support the conclusion that the respondents' failure to pay the remaining fractional balance entitles the appellants to sue and recover the unpaid sum. It does not, in my view, entitle them to treat the contractual arrangement with the respondents as being at an end. To put in classical terms, the appellants are entitled to treat the respondents' refusal to pay as the breach of a warranty and sue for damages: they are not entitled to treat it as the breach of a condition and to repudiate the bargain altogether.

There is another way of saying much the same thing. The respondents' refusal to pay is not a breach that went to the root of the contract. It therefore did not entitle the appellants to repudiate the entire bargain. We had occasion to examine the applicable principle in *Abdul Razak bin Datuk Abu Samah v Shah Alam Properties Sdn Bhd* [1999] 2 MLJ 500 at p 506:

> An alternative method of classification of the terms of a contract is according to, not their relative importance, but the consequences of their breach. This approach is especially useful in cases of synallagmatic contracts. Under the alternative method, if the breach of a particular term goes to the root of the contract so as to affect its very substratum, then, the remedy of the innocent party lies in repudiation and damages. However, if its breach produces lesser consequences, the remedy of the innocent party lies in damages only. See *Bowes v Chaleyer* (1923) 32 CLR 159; *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha* [1962] 2 QB 26.

It follows that since the appellants terminated the contract when they were not entitled to do so, they were themselves in breach of contract.

There is a second and more important reason why the appellants were not justified in terminating the entire relationship. They were, as found by the learned judge, already in breach of their obligation to construct the infrastructure works in accordance with the amended plans in respect of which they had not obtained the first respondent's consent. That, of course is a breach that struck at the very heart of the Turnkey contract. It entitled the respondents to hold the appellants to be in breach of contract. Further, the second supplementary agreement expressly required the appellants to complete the infrastructure works (by implication) in accordance with the agreed original plans. As the appellants were in breach of contract they were not, in the view I take of the matter, entitled to demand for any further payments from the respondents.

For these reasons, the question whether the appellants were entitled to terminate the agreements they had with the respondents must receive a negative response.

With that I now turn to the relief that the respondents were entitled to have in consequence of having proved their case to the satisfaction of the trial court.

The relief

The learned judge granted the respondents both specific relief and damages for loss of profits against the first appellant. He also granted an order of vacant possession against the second appellant as well as damages being the cost of rectification works. He set off against this sum the amount escheated by the first respondent upon the performance bond furnished by the second appellant. He also ordered the third appellant to indemnify the respondents for the damages they suffered consequent upon the first and second appellants' breach of contract. Additionally, the learned judge awarded specific relief and liquidated damages for late delivery to the seven companies in the counterclaim. I will address each of these in broad terms.

First the grant of specific relief against all the first and second appellants and in favour of all the respondents. The fundamental obligation on the part of the appellants was to hand over to the respondents the bungalow lots in question with the infrastructure works completed in accordance with the relevant plans. The respondents' right to have the lots in question together with all the appurtenant rights is beyond argument. Specific relief, whether by way of injunction, specific performance or declaration or a combination of these remedies is the usual relief that is granted to an innocent party in an action for breach of contract. The first respondent was therefore entitled to the specific relief granted by the learned judge. Being essentially equitable relief, there is a fairly wide discretion available to the trial judge to determine where the balance of justice lies when making up his mind on whether to grant such relief. An appellate court ought not lightly to interfere with the exercise of such discretion unless it is satisfied, inter alia, that justice has miscarried. The facts of the present case amply demonstrate an almost wilful refusal on the part of the first and second appellants to adhere to the terms of the bargain they had entered into and for which they had already collected a substantial portion of the contract price. In those circumstances, I find no error in the way in which the learned judge exercised his discretion in granting the different forms of specific relief in this case.

I now turn to deal with the award of damages for loss of profit made against the first appellant. Here, it is important to examine the precise loss for which the first respondent was seeking compensation. It already had obtained orders that gave it the land it was supposed to have under the terms of the transaction in question. There was already an award of damages against the second appellant being the cost of rectification works. That would put the land in the state in which it ought to have been if the contract had been properly performed. There is no question, therefore of the first respondent suffering any loss of profits. Accordingly, the learned judge was plainly wrong in awarding the first respondent a sum of RM79,397,486.49 as damages for loss of profits. I would accordingly intervene and set aside this award.

Next is the award of loss of RM5,860,120 as damages for the cancellation of sales occasioned to the first respondent, to quote the learned judge, 'because of the dispute with the first defendant.' I must confess my

inability to see the rationale for such an award. It is not based on any finding that the appellants had failed to hand over the lots in question to the respondents' sub-purchasers. There is nothing to suggest from the evidence that this so-called loss would have happened anyway for other reasons, eg because of the downturn in the economy. As such, this is also a head of damage that cannot possibly be sustained. It must be set aside. And that is what I propose to do.

Fourth is the award for the cost of rectification works. This head of damage is plainly recoverable. The second appellants ought to have done the infrastructure work in accordance with the agreed specifications. They did not. They must pay the respondents the cost of putting matters right. The judge rightly set off the sum represented by the performance bond. There is nothing wrong with this award. I would affirm it.

Fifth, is the award of damages in favour of the seven companies. Now, when I first read the records in this case, I thought that the award to the seven companies amounted to a duplication in the respondents' favour. The point was squarely put to Mr Anantham who appeared for the seven companies. He submitted that there was no duplication. I think that counsel is right and that I was wrong in the first impression I gained of the matter. The award here is for late delivery in accordance with the terms of the contract. There does not appear to have been any quarrel about the point in the court below. I would therefore uphold all the relief awarded to the seven companies.

Sixth, and lastly, there is the order directing the third appellant to indemnify the respondents. I have very early in this judgment set out the contractual provision pursuant to which this order was made. The clause in question has nothing whatsoever to do with the issue that the judge actually decided upon. The true purpose of the clause is to make the third appellant responsible for any loss caused to the respondents by third parties, such as sub-contractors and the like in the process of executing the works under the Turnkey contract. By no stretch of the imagination can it be construed to mean that the third appellant undertook to indemnify the respondents for the breach of contract by companies that in truth were her alter egos. This part of the judgment of the learned judge cannot stand. I would set it aside. As a matter of pure consequence of my conclusion on this part of the case, the respondents' claim against the third appellant is dismissed.

There is one other matter that arises out of the third appellant's appeal. It has to do with the order of impeachment of her evidence made by the learned judge. Mr Narayanan submitted that there ought to have been no order of impeachment. Ahmad Moosdeen for the first respondent argued that the impeachment was carried out in accordance with settled law and practice. With respect, I am unable to agree with the arguments raised by counsel for the first respondent. I find it unnecessary to recite the unfortunate turn of events leading up to the impeachment of the third appellant's evidence. Suffice to say that the so-called contradiction was upon a very minor point and entirely collateral to the main issues in the case. It had to do with an allegation by the third appellant in one of her

affidavits delivered at the interlocutory stage that a police report was lodged when in fact none had been. But it must be said in fairness to her that she proffered an explanation for her error. It seems to be quite a reasonable explanation. Even if it was not, the contradiction was on so collateral a point that it was really unnecessary for counsel and the judge to have blown it out of all proportion by making a mountain out of a mole hill. After all, there was ample material on record to hold that she was not a credible witness without subjecting her to the humiliation of an impeachment order. We were invited by counsel for the appellants to set aside the order. That is what I propose to do.

Summary of conclusions

I would summarize my conclusions on this appeal as follows:

(1) All the agreements entered into between the parties in this case should be read together.

(2) When they are so read, it is clear that the Turnkey contract is not a sham and that the parties had obligations to fulfil under it.

(3) The appellants were under a contractual obligation to construct the infrastructure works on the subject property in accordance with the specifications contained in the plans referred to in the Turnkey contract.

(4) The appellants were under a contractual obligation not to amend the plans aforesaid without the prior consent of the first respondent.

(5) In breach of the said obligation, the appellants carried out the infrastructure works in accordance with plans that had been amended without the knowledge of the respondents. Further, the appellants persisted in proceeding with the infrastructure works otherwise than in accordance with the agreed specifications.

(6) This breach by the appellants was of a fundamental obligation and went to the very root of the bargain between the parties. The first respondent was accordingly justified in putting an end to the contract between the parties.

(7) The appellants were wrong in asserting that the respondents had acted in breach of contract. The respondents had paid a substantial sum — about RM140m — to the appellants. They did not get their money's worth. They refused to pay the balance due. They were justified in doing so. The appellants were therefore not entitled to put an end to the bargain they had with the respondents. They were, at best, entitled to sue for the balance due under the agreements. Since they had repudiated the contractual bargain when they were not entitled to do so, they were in breach of contract.

(8) The first respondent was entitled to obtain specific relief against the first appellant. But it was not entitled to any loss of profits. As against the second appellant, the first respondent was entitled to recover the cost of carrying out rectification works.

(9) The seven companies who were parties to the counterclaim were entitled to specific relief to enforce their rights under the agreements they had with the appellants. Such of them as were handed their lots beyond the agreed contractual date were entitled to be indemnified for the delay in accordance with the terms of their respective agreements.

(10) The third appellant was not under any obligation to indemnify the respondents for damages they suffered in consequence of the breach of contract by the first and/or second appellants. The judge accordingly erred in so holding.

(11) Impeachment proceedings against the third appellant ought not to have been commenced by the learned judge as the contradiction relied upon was on a matter too far removed from the mainstream of the issues in dispute.

The upshot

For the reasons already given, I would make the following orders on this appeal:

(1) the appeal of the first and second appellants on the issue of liability for breach of contract is dismissed;

(2) the appeal by the first appellant against the declarations and other orders of specific relief is dismissed;

(3) the first appellant's appeal against the award of damages is allowed. This part of the judgment of the court below is set aside;

(4) the second appellant's appeal against the award of damages for rectification works is dismissed. The set-off ordered by the judge against the sum escheated upon the performance bond is affirmed;

(5) the third appellant's appeal is allowed. The order requiring her to indemnify the first respondent is set aside;

(6) the order of impeachment of the third appellant's credit is set aside. However, this will not affect the finding of lack of *credibility* on her part by the learned judge;

(7) the appeals against the seven companies are dismissed and all the orders made in their favour are affirmed.

Now on the question of costs. The first respondent and the seven companies, though really part and parcel of one and the same entity, had to be separately represented because of the way in which the course of litigation took in the court below. As such, there is sufficient justification for the presentation of two separate bills of costs. However, the taxing registrar should note that the getting up in respect of the seven companies cannot exceed that of the first respondent as the case of the former was far less complex than that of the latter. Taking into account all relevant considerations, including the partial success of the first appellant, I would order that the first respondent and the seven companies recover 80% of their taxed costs from the first and second appellants. The deposits paid

into court by the first and second appellants will be paid out to the first respondent to account of its taxed costs.

As far as the third appellant is concerned, she has succeeded in her appeal and should recover all her costs here as well as in the court below. The deposit paid into court by the third appellant is refunded to her.

My learned sister, Siti Norma Yaakob JCA and my learned brother Abdul Kadir Sulaiman JCA, have seen this judgment in draft and express their concurrence with it.

In conclusion, I would like to convey my appreciation to counsel on both sides for the assistance they have rendered us in this appeal.

Order accordingly.

Reported by Jafisah Jaafar